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IN THE

Supreme Court of the United States

October Term, 1969
No. 237

BISHOP COLLINS,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENT IN OPPOSITION

CHARLES O. CARROLL
King County Prosecuting Attorney
ALBERT A. RINALDI, JR.
Deputy Prosecuting Attorney
JAMES E. KENNEDY
Chief Civil Deputy
Attorneys for Respondent

Office and Post Office Address:
W554 King County Courthouse
Seattle, Washington 98104

METROPOLITAN PRESS SEATTLE, WASH.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENT IN OPPOSITION

Respondent, State of Washington, submits the following brief in opposition to the granting of a writ of certiorari to review the order denying the motion to recall the remittitur entered by the Supreme Court of the State of Washington on March 14, 1969.

CITATIONS TO OPINIONS BELOW

The citations to the opinions below are adequately set forth in the petition.

JURISDICTION

The jurisdictional requirements are adequately set forth in the petition.

QUESTION PRESENTED

Whether the Supreme Court of the State of Washington should be required to recall its remittitur and again decide the legality of a proposed jury instruction where retained counsel for the defendant, who successfully argued his motion for a new trial, is later appointed on the State's appeal of the order granting a new trial, where appointed counsel has signed a statement of facts and a supplemental agreed statement of facts where the only issue before the Supreme Court of the State of Washington on the appeal from the order granting a new trial was an issue of law regarding a proposed jury instruction which could be decided without brief or argument by counsel, where the defendant had not cooperated with appointed counsel and where an appeal from the entry of the judgment and sentence is still pending at which time the issue of the propriety of the proposed instruction can again be raised.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are adequately set forth in the petition.

STATEMENT OF THE CASE

On July 22, 1966, the petitioner Bishop Collins was charged by information filed in the Superior Court of King County, State of Washington, with the crime of

burglary in the second degree, Count I and Count II. He was tried before a jury on September 26 and 27, 1966 and convicted by the jury of Count II on September 27, 1966. Count I was dismissed at the end of the State's case on the basis of insufficient evidence. At the trial, the petitioner was represented by attorney Edmund J. Wood and the respondent was represented by Charles O. Carroll, King County Prosecuting Attorney, by his deputy John S. Ludwigson.

On September 29, 1966 a motion for a new trial was filed by attorney Edmund J. Wood (R. 0096). It is set forth in full at appendix page A-1. Mr. Wood subsequently withdrew from the case and was replaced by Walter Greenaway, who was retained by the petitioner. Argument on the motion was made before the trial judge, the Honorable Lloyd Shorett, by Mr. Greenaway and Mr. Ludwigson on October 14, 1966 and again on November 2, 1966. On November 18, 1966 Judge Shorett signed an order granting a new trial. It is set forth in full in the appendix page A-6 to A-7 of the petition.

The State then filed notice of appeal on November 23, 1966 (R. 0001-0003). A statement of facts was filed on February 17, 1967 with the Superior Court of the State of Washington (R. 0043-0057) and a supplemental agreed statement of facts was filed with the Superior Court of the State of Washington on April 26, 1967 (R. 0058-0061). The petitioner's counsel Mr. Greenaway signed both the statement of facts and the supplemental agreed statement of facts.

On August 17, 1967, Mr. Greenaway was appointed counsel for the appeal (R. 0097). Subsequently on or

about October 23, 1967 Mr. Greenaway telephoned Mr. William M. Lowry, Clerk of the Washington State Supreme Court, and indicated that he did not intend to file a brief on behalf of the petitioner since he was unable to locate the petitioner and had no means of finding him. Mr. Lowry responded with a letter dated October 23, 1967 (which is set forth in full in appendix page A-9 of the petition) to the effect that the intentions of Mr. Greenaway were approved if Mr. Greenaway would file an affidavit setting forth that diligent efforts to locate the petitioner had been made. Mr. Greenaway did file the affidavit on February 20, 1969. It is set forth in full in appendix page A-10 through A-11 of the petition.

Mr. Greenaway did not file a brief on behalf of the petitioner nor did he appear at the time set for argument. Mr. Ludwigson did file a brief for the State of Washington (R. 0062) and Thomas Wampold represented the State at the time of argument. On December 14, 1967 the Washington State Supreme Court, after having reviewed the merits of the appeal, entered an order reversing the Superior Court's order granting a new trial, and the cause was remanded for reinstatement of the jury verdict (R. 0063 to R. 0068) reported at 72 Wn.2d 741, 435 P.2d 538 (1967). On January 15, 1968 the Washington State Supreme Court remitted its decision of December 14, 1967 to the Superior Court for the State of Washington (R. 0069). Judgment and sentence was entered on January 26, 1968 (R. 0098). On February 9, 1968 timely notice of appeal was filed by the petitioner which appeal is still pending in the court below.

Mr. Irving C. Paul, Jr., was subsequently retained by

petitioner and on December 13, 1968, filed a motion and affidavit for an order recalling the remittitur (R. 0070-0071).

Memorandum briefs were filed by petitioner (R. 0072-0076) and respondent (R. 0079-0090). On March 14, 1969 argument was made to the Supreme Court of the State of Washington by Irving Paul, Jr. counsel for petitioner and Charles O. Carroll, King County Prosecuting Attorney, by his deputy Albert A. Rinaldi, Jr. The motion to recall the remittitur was denied (R. 0091). Petitioner then filed a petition for rehearing on April 7, 1969 (R. 0092-0095), which was not acted upon by the Supreme Court of the State of Washington. The letter of April 15, 1969 from Supreme Court Clerk William M. Lowry is set forth in full in appendix page A-2. The petition for certiorari is directed to the order of March 14, 1969.

ARGUMENTS AGAINST GRANTING WRIT OF CERTIORARI

United States Supreme Court Rule 19, 28 U.S.C.A., states in substance that the writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore, *Fay v. Noia,* 372 U.S. 391. Respondent submits that there are no special and important reasons for granting the writ in this case.

When the Washington State Supreme Court entered its opinion of December 14, 1967 in *State v. Collins,* 72 Wn.2d 741, 435 P.2d 538, which is set forth in full at appendix page A-1 to A-5 of the petition; it had before it a statement of facts (R. 0043 to 0057), an agreed

statement of facts (R. 0058-0061), the proposed instructions of the petitioner (R. 0018-0022) and the Superior Court's instructions to the jury (R. 0006-0017). Since the statement of facts and supplemental agreed statement of facts complied with Rule 34 and Rule 36 of the Washington State Supreme Court rules on appeal, it was unnecessary to submit a statement of facts of the entire trial proceedings. The pertinent portions of Rule 34 and Rule 36 are set forth at appendix A-3 and A-4. Further, the same counsel who was latter appointed to represent petitioner on the appeal signed both the agreed statement of facts and the supplemental agreed statement of facts.

The only issue before that court on the State's appeal from the order granting the new trial was the propriety of petitioner's proposed instruction on recently stolen property. The question was very narrow and only a question of law. It is true that appointed counsel for the petitioner did not file a brief nor did he argue before the court. However, to say that it was necessary for this to be done is to say that the Washington Supreme Court was not capable of deciding the propriety of a proposed instruction when it had all of the facts and instructions before it. A reading of the decision in the *Collins* case, *supra,* will indicate that the court in that case was quite positive in its determination that petitioner's proposed instruction was not proper.

The petitioner argues that he was deprived of his right to effective assitance of counsel because appointed counsel did not file a brief nor did he argue before the Washington Supreme Court. Then petitioner goes on to cite *Gideon v. Wainwright,* 372 U.S. 335; *Escabedo v.*

Illinois, 378 U.S. 478; *Miranda v. Arizona,* 384 U.S. 436; *Anders v. California,* 386 U.S. 738; *Entsminger v. Iowa,* 386 U.S. 748 and *Mempa v. Rhay,* 389 U.S. 128. Of these cases cited, only the *Anders* and *Entsminger* cases have any relation to the case at hand and both can be distinguished from the case at hand.

In *Entsminger,* this court was mostly concerned with the fact that the lower court did not have a proper transcript before it upon which to base its decision. In this case, as pointed out above, all of the facts necessary for the decision were before the Washington State Supreme Court.

The *Anders* case, although closer to this case, can nonetheless be distinguished from this case. The *Anders* case involved an appeal from a conviction by the defendant; this case involved an appeal by the State from an order granting a new trial. In *Anders* the petitioner wished to file and in fact did file a brief. In this case petitioner could not be located by appointed counsel. In *Anders* there was a request for the appointment of another attorney while in this case there was none since petitioner could not be located. Finally, in *Anders,* the Appellate Court was called upon to review the alleged errors committed at the trial level while in this case, as indicated above, the issue was very limited, i.e., the propriety of the petitioner's proposed instruction. Since on its facts *Anders* differs from this case, this court has another reason to deny the writ.

A further reason for denying the writ is that there is an appeal from the judgment and sentence of the petitioner (R. 0098) which is still pending in the Wash-

ington State Supreme Court. The petitioner may be able to raise the issue of the propriety of the proposed jury instruction on that appeal. Admittedly, the State will most likely argue that the decision in the earlier *Collins* case, *supra*, becomes the law of the case, and thus the petitioner might have some difficulty in urging the Washington State Supreme Court to review its decision in the earlier *Collins* case. However, it is respondent's position as pointed out earlier that the decision in the *Collins* case was a sound one and if the Washington State Supreme Court is required to review it, the decision will be the same way.

Much emphasis is placed by petitioner upon the concept of the effective assistance of counsel. But what must appointed counsel do when he is unable to locate the petitioner and the petitioner does not assist counsel? Certainly there must be a duty upon the petitioner to keep appointed counsel informed of his whereabouts. It is submitted that petitioner is not without fault and should not be granted this discretionary writ.

In *State v. Louie*, 68 Wn.2d 304, 413 P.2d 17, the Washington State Supreme Court said it must look to substance and not labels in ascertaining whether constitutional rights to assistance of counsel have been violated. It is submitted that the same substance test should be applied here. If this court grants the writ as requested by the petitioner, it will require the Washington Supreme Court to needlessly review a decision which it has made, when it had all of the facts and instructions before it, without a showing by the petitioner that the court will or should decide that limited issue differently. Perhaps the

Washington State Supreme Court felt that there was no substance in the petitioner's arguments when it denied the motion to recall the remittitur on March 14, 1969. It is submitted that there is no substance to petitioner's arguments since they are in fact frivolous.

Finally, the petition should be denied because the decision of the Washington State Supreme Court in refusing to recall the remittitur was correct. A reading of the *Collins* case, *supra*, clearly indicates that the proposed instruction of the petitioner was not properly drawn since it required that the respondent prove beyond a reasonable doubt that the property in question was recently stolen. This would require too great an emphasis upon one instruction when all of the instructions should be considered as a whole. Since the instruction was erroneous, it need not have been given, and if the Washington State Supreme Court were to review its decision it would arrive at the same result.

CONCLUSION

The petition for a writ of certiorari should be denied since there are no special and important reasons to grant it, petitioner was not denied effective assistance of counsel, an appeal is still pending in the Washington State

Supreme Court, the petitioner's arguments are frivolous, and the decision by the Washington State Supreme Court in the *Collins* case was correct.

Respectfully submitted,

CHARLES O. CARROLL
King County Prosecuting Attorney
ALBERT A. RINALDI, JR.
Deputy Prosecuting Attorney
JAMES E. KENNEDY
Chief Civil Deputy
Attorneys for Respondent

APPENDIX A

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON, *Plaintiff,* v. BISHOP COLLINS, *Defendant.*	No. 44665 MOTION FOR NEW TRIAL

The defendant Bishop Collins, by and through his attorney Edmund J. Wood, moves for a new trial on the following grounds:

1. That there is no evidence or reasonable inference from the evidence to justify the verdict.
2. Error in law occurring at the trial and expected at the time by the defendant, to-wit, failure of the court to give the defendant's proposed instruction.

s/EDMUND J. WOOD
Of Coney & Collier
Attorney for Defendant

APPENDIX B

April 15, 1969

Mr. Irving C. Paul, Jr.
Attorney at Law
620 Arctic Building
Seattle, Washington 98104

Honorable Charles O. Carroll
Prosecuting Attorney
King County Courthouse
Seattle, Washington 98104

Gentlemen:

Re: No. 39303—State v. Bishop Collins

Respondent Bishop Collins' petition for rehearing of the Court's order of March 14, 1969, was filed on April 7, 1969.

The only provision for consideration of a petition for rehearing is contained in ROA 50. ROA 50 provides for a petition for rehearing after an opinion is filed. The petition in question is directed to an order not to an opinion. There being no provision for the consideration of a petition for rehearing under the instant circumstances, it will be filed without action.

Very truly yours,

s/WILLIAM M. LOWRY
Clerk

WML:mas

APPENDIX C

RULE 34—*Statement ~~of~~ facts—Time for serving and filing—Certification.*

. . . (4) (Appeal on agreed statement of facts.) When the question or questions presented by an appeal in any cause can be determined without an examination of all the pleadings, evidence, and proceedings in the superior court, the parties may prepare and sign a statement of the case showing how the question or questions arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the question or questions by this court. The statement shall include a copy of the judgment from which the appeal is taken, a copy of the notice of appeal and of the appeal bond, together with their respective filing dates, and *a concise statement of the points to be relied on by the appellant,* and shall be filed with the clerk of the superior court within the time provided for the filing of a statement of facts. If the statement conforms to the truth, it, together with such additions as the trial court may consider necessary fully to present the question or questions raised by the appeal shall be approved in writing by the trial judge and, when so approved, shall constitute the record on appeal, and be transmitted to this court in the same manner as a statement of facts.

APPENDIX D

RULE 36—*Statement of facts—Amendments—Notice to settle.*

A party desiring to have a statement of facts certified must prepare the same as proposed by him file it in the cause and serve a copy thereof on the adverse party, and shall also serve written notice of the filing thereof on any other party who has appeared in the cause. Within ten days after such service any other party may file and serve on the proposing party any amendments which he may propose to the statement: *Provided,* That the superior court may extend the time not to exceed an additional twenty days for filing and serving proposed amendments to the proposed statement of facts, if good cause be shown and the application for extension of time be made within the ten-day period, and after notice to opposing counsel, Either party may then serve upon the other a written notice that he will apply to the judge of the court before whom the cause is pending or was tried, at a time and place specified, the time to be not less than three nor more than ten days after service of the notice, to settle and certify the statement; and at such time and place, or at any other time or place specified in an adjournment made by order or stipulation, the judge shall settle and certify the statement. If the judge is absent at the time named in a notice or fixed by adjournment, a new notice may be served. If no amendment shall be served within the time aforesaid, the proposed statement shall be deemed agreed to and may be certified by the judge at the instance of either party, at any time, without notice to any other party on proof being filed of its service, and that no amendments have been proposed; and if amendments be proposed and accepted, the statement as so amended shall likewise be certified on proof being filed of its service and the service and acceptance of the amendments. [Adopted Nov. 22, 1950, effective Jan. 2, 1951; rule amended, adopted Dec. 12, 1956, effective Mar. 1, 1957.]